A

MALAYAN BANKING BHD

v.

NEWAY DEVELOPMENT SDN BHD & ORS

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[SUIT NO: K22-61-2002]
4 MAY 2009

C ***CONTRACT:*** *Agreement - Term loan facility - Illegality - Whether an illegal agreement by virtue of s. 17(1) Sabah Land Ordinance - Object of transaction - Whether unlawful - Whether void by virtue of s. 24(a) and (b) Contracts Act 1950*

D The fourth defendant, a property development company, wanted to carry out a project known as "Mixed Use Development Project" ('the project') on lands held under native titles. Being a non-native, the fourth defendant was prohibited by law from purchasing them directly from the owners. In order to purchase
E the lands the fourth defendant used a native nominee in the person of Chin Nyuk Fong to hold the lands in her name in trust and on its behalf. The term loan facility agreement of RM2.8 million was executed by Mayban Finance Berhad (as the plaintiff was then known as) and the fourth defendant on 30 January
F 1997. The expressed purpose of the loan was to part finance the purchase of a piece of land held under NT213013480, District of Penampang, Sabah. The project however failed to take off the ground and the fourth defendant for the second time used its nominee Chin Nyuk Fong to sell off the native lands in order to
G repay both the plaintiff (Malayan Banking Berhad) and Mayban Finance. The term loan facility of RM2.8 million was settled in part only and there was still a balance of RM1,715,956.32 owing to the plaintiff. It was this amount that the plaintiff was now claiming from the defendants. The issue that arose was whether
H the term loan facility of RM2.8 million granted by Mayban Finance Berhad to the fourth defendant was an illegal agreement by virtue of s. 17(1) of the Sabah Land Ordinance ('the Land Ordinance') read with s. 24 of the Contracts Act 1950.

I

Held (dismissing plaintiff's claim against the defendants):

(1) Chin Nyuk Fong was used by the fourth defendant to purchase NT213013480. She had no beneficial interest whatsoever in the land. She did not even spend a single sen to purchase the land. The land was meant for the fourth defendant's project. She was merely an instrument to regularize an otherwise illegal transaction. Her execution of the trust deed in favour of the fourth defendant dispelled any doubt as to the real intention behind the transaction. By allowing her name to be used in the purchase of NT213013480 and following it up by executing the trust deed in favour of the fourth defendant, Chin Nyuk Fong had in fact conspired with the fourth defendant to do an illegal act. Therefore in pith and substance, the intention from the start was to defeat the law. This was the kind of act that s. 17(1) of the Land Ordinance aimed to strike down. (para 15)

(2) Section 17(1) of the Land Ordinance is designed to protect native lands from being transferred to non-natives. The duty of the court is to give effect to the legislature's intention by not recognizing any transaction howsoever described and howsoever devised that aimed to divest native interest in native lands in favour of non-natives except by way of a charge in favour of a financial institution, which is permitted by s. 17(4). Section 17(1) of the Land Ordinance is worded strongly enough to convey this legislative intent. (para 16)

(3) Since the object of the transaction was unlawful it was void by virtue of s. 24(a) and (b) of the Contracts Act 1950. Clearly the purchase of NT213013480 by the fourth defendant was both forbidden by law and of such a nature that if permitted would defeat the law. It was therefore void and unenforceable. The term loan facility of 2.8 million which facilitated the purchase was likewise void for illegality. (paras 18 & 19)

(4) Mayban Finance and the fourth defendant were in *pari delicto* when they entered into the term loan facility agreement on 30 January 1997. The agreement was tainted with illegality as the purpose was to facilitate an illegal act. The illegality of the term loan facility agreement in turn tainted the deed of assignment, the letters of guarantee and the corporate guarantee executed pursuant to the agreement. (para 21)

(5) As an established financial institution whose business it was to give out loans to the public it was inconceivable that the plaintiff would not have at least investigated the legal status of NT213013480 before entering into the term loan agreement with the fourth defendant. After all, it was in the plaintiff's interest to make sure that the contract they entered into was not tainted with illegality. Surely the plaintiff could not be heard to say that it was none of their business to find out if the purchase of NT213013480 (which they must have known to be native title) by the fourth defendant (whom they knew to be a non-native) did not breach any law. The manner in which the whole transaction was carried out must have aroused their suspicion. The plaintiff knew or at the very least suspected that the purchase of NT213013480 by the fourth defendant was in breach of the Land Ordinance. They must bear the consequences of their imprudence. (para 26)

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra Malaysia Bhd & Anor [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 HC ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

Spector v. Agenda [1971] 3 All ER 417 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24(a), (b), 66

Interpretation (Definition of Native) Ordinance (Cap 4), s. 2

Sabah Land Ordinance, ss. 17(1), (4), 64(1)

For the plaintiff - Brendon Soh; M/s Ronny Cham & Co

For the defendants - Baldev Singh; M/s Baldev Gan & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] There are several issues raised in this trial but the dominant issue is whether the term loan facility of RM2.8 million granted by Mayban Finance Berhad (as the plaintiff was then known as) to the 4th defendant was an illegal agreement by virtue of s. 17(1) of the Sabah Land Ordinance (the Land Ordinance) read with s. 24 of the Contracts Act 1950 (the Contracts Act). If it was

then the agreement is void and unenforceable and the defendants are consequently not liable to the plaintiff for monies owing pursuant to the agreement. It is settled principle that he who comes to court for relief must come with clean hands. A

[2] The facts material to the issue are as follows. Sometime in 1996 the 4th defendant, a property development company wanted to carry out a project known as "Mixed Use Development Project" (the project) on lands held under native titles NT213109490, NT213164928, NT213139630 and NT213013480 all located in the District of Penampang at Donggongon Township, Sabah. Being a non-native the 4th defendant was prohibited by law from purchasing them directly from the owners. In order to purchase the lands the 4th defendant used a native nominee in the person of Chin Nyuk Fong to hold the lands in her name in trust for and on its behalf. She was a staff of the 4th defendant. Pursuant to this arrangement Chin Nyuk Fong entered into four separate sale and purchase agreements with the following land owners: B C D

(1) NT213139630 was purchased from one Chong Nyuk Fung @ Chong Nyuk Kiong on 14 March 1997. E

(2) NT213164928 was purchased from one Wita bte Jipanis on 15 April 1997.

(3) NT213109490 was purchased from one Anthony Lajuta on 1 April 1997. F

(4) NT213013480 was purchased from one Tan Haw Bin on 29 October 1996.

[3] The total cost of the four parcels of land was RM5.2 million. After the lands were registered in her name Chin Nyuk Fong executed and granted several trust deeds and powers of attorney in favour of the 1st defendant except the trust deed for NT213013480 which was executed in favour of the 4th defendant. Part of the purchase price for the lands was paid by the 4th and 1st defendants while the balance was to be financed using facilities to be procured from the plaintiff and Mayban Finance Berhad (Mayban Finance). G H

[4] The term loan facility agreement of RM2.8 million was executed by Mayban Finance and the 4th defendant on 30 January 1997. The expressed purpose of the loan was: I

To part finance the purchase of a piece of land held under NT213013480, District of Penampang, Sabah.

[5] In addition to the term loan facility of RM2.8 million Mayban Finance also granted a bridging loan facility of RM3.5 million to finance the development of the 4th defendant's project on NT213013480. By a deed of assignment dated 8.9.1997 the term loan facility of RM2.8 million was absolutely assigned to the 1st defendant by the 4th defendant who stood as corporate guarrantor to the 1st defendant. This assignment was with the full knowledge and consent of Mayban Finance.

[6] Two letters of guarantee dated 30 January 1997 and 8 July 1997 respectively were further executed by the 2nd and 3rd defendants in favour of Mayban Finance as security for the loan sums of RM2.8 million and RM3.5 million.

[7] The plaintiff (Malayan Banking Berhad) had also granted to the 1st defendant an additional term loan facility of RM2.2 million and a bridging loan facility of RM6 million to finance the purchase of the other three parcels of native lands, namely NT213109490, NT213164928 and NT213139630 and the development of 33 units of 3 storey shophouses under phase two of the mixed commercial development undertaken by the 1st defendant.

[8] The project however failed to take off the ground as sometime in October 1998, the plaintiff cancelled the RM6.0 million bridging loan allegedly on the ground that the 1st defendant failed to submit its application for drawdown within the availability period. Only the term loan of RM2.2 million was released to the 1st defendant. The plaintiff refused to reinstate the bridging loan of RM6.0 million despite repeated appeals by the 1st defendant.

[9] Since the project could not proceed the 1st defendant had no alternative but to surrender the project to an interested party to minimise losses. The 4th defendant for the second time used its nominee Chin Nyuk Fong to sell off the four parcels of native lands in order to repay both the plaintiff and Mayban Finance. The proceeds of sale amounting to RM5.2 million were used to settle in full the 1st defendant's debts owing to the plaintiff. In respect of the 1st defendant's debt to Mayban Finance, the bridging loan facility of RM3.5 million was also settled in full but the term loan facility of RM2.8 million was settled in part only.

There is still a balance of RM1,715,956.32 owing to the plaintiff. It is this amount that the plaintiff is now claiming from the defendants.

[10] In resisting the plaintiff's claim the defendants say that the term loan facility agreement executed by the 4th defendant and Mayban Finance on 30 January 1997 is tainted with illegality as it contravened s. 17(1) of the Land Ordinance. Section 17(1) of the Land Ordinance provides as follows:

> Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any Court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the following clause.

[11] Section 64(1) further provides:

> This Part shall apply only to lands held by natives, and no non-native may purchase any land held under this Part, unless in accordance with the terms of section 17, or acquire any interest therein by way of charge or otherwise.

[12] The word "dealing" is defined by s. 4 to mean "any transaction of whatever nature by which land is affected" under the Land Ordinance. It is a meaning of wide import. The 4th defendant is not a native within the meaning of s. 2 of the Interpretation (Definition of Native) Ordinance (Cap. 4).

[13] There is no dispute that the term loan facility agreement executed between Mayban Finance and the 4th defendant on 30 January 1997 was for the sole purpose of part financing the purchase of NT213013480 by the 4th defendant. The transaction is therefore forbidden by s. 64(1) of the Land Ordinance.

[14] Learned counsel for the plaintiff contended that since NT213013480 was not registered in the name of the 4th defendant but in the name of Chin Nyuk Fong (a native) there was no contravention of s. 17(1) of the Land Ordinance. In other words since the sale and purchase of NT213013480 did not involve a non-native there is no question of any contravention of the law. With due respect learned counsel has completely missed the point. The question is not in whose name the land was registered. The question is whether the registration was to achieve an illegal purpose.

[15] On the surface there is nothing irregular about the transaction involving NT213013480. It is a dealing between two willing natives. But the simple truth beneath the surface is that Chin Nyuk Fong was used by the 4th defendant to purchase NT213013480. She had no beneficial interest whatsoever in the land. She did not even spend a single sen to purchase the land. The land was meant for the 4th defendant's project. She was merely an instrument to regularize an otherwise illegal transaction. Her execution of the trust deed in favour of the 4th defendant dispels any doubt as to the real intention behind the transaction. By allowing her name to be used in the purchase of NT213013480 and following it up by executing the trust deed in favour of the 4th defendant, Chin Nyuk Fong had in fact conspired with the 4th defendant to do an illegal act. Therefore in pith and substance the intention from the start was to defeat the law. This is the kind of act that s. 17(1) of the Land Ordinance aims to strike down.

[16] Section 17(1) of the Land Ordinance is designed to protect native lands from being transferred to non-natives. The duty of the court is to give effect to the legislature's intention by not recognizing any transaction howsoever described and howsoever devised that aims to divest native interest in native lands in favour of non-natives except by way of a charge in favour of a financial institution, which is permitted by s. 17(4). Section 17(1) of the Land Ordinance is worded strongly enough to convey this legislative intent.

[17] It was contended by learned counsel for the plaintiff that the question of illegality does not arise as the word "native" refers to a natural person and that since the 4th defendant is not a natural person it is not a non-native and therefore the purchase of NT213013480 was not a dealing between a native and a non-native. I must say I am unable to comprehend the logic behind this reasoning. It is precisely because the 4th defendant is not a natural person that it does not qualify as a native. The 4th defendant itself acknowledged this fact and that is why it used a native to purchase the four parcels of native land, including NT213013480.

[18] Since the object of the transaction was unlawful it is void by virtue of s. 24(a) and (b) of the Contracts Act which provides:

> The consideration or object of an agreement is lawful, unless

(a) it is forbidden by law

(b) it is of such a nature that, if permitted, it would defeat any law;

[19] Clearly the purchase of NT213013480 by the 4th defendant is both forbidden by law and of such a nature that if permitted would defeat the law. It is therefore void and unenforceable. The term loan facility of RM2.8 million which facilitated the puchase is likewise void for illegality. There is sufficient authority on the point. Suffice for me to cite two of them. The first is *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 FC where Peh Swee Chin FCJ cited with approval the following proposition of law by Devlin J in the leading case of *St John Shipping Corp v. Joseph Rank Ltd* [1957] 1 QB 267 at p. 283:

> The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and if unilateral, it is unenforceable at the suit of the party who is proved to have it.. The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable.

[20] The second case is *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 where Hashim Yeop Sani CJ (Malaya) said:

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforceable obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person involving the aid of the court is himself implicated in the illegality.

[21] On the evidence before the court it is clear that Mayban Finance and the 4th defendant were in *pari delicto* when they entered into the term loan facility agreement on 30 January 1997. The agreement is tainted with illegality as the purpose was to facilitate an illegal act. The illegality of the term loan facility agreement in turn taints the deed of assignment, the letters of guarantee and the corporate guarantee executed pursuant to the agreement. In this connection what Megarry J said in *Spector v. Agenda* [1971] 3 All ER 417 at p. 426 is relevant:

> Without going into that, it seems to me that the answer lies in a case cited on the same page of Cheshire and Fifoot that I have just mentioned as being the leading authority: *Fisher v. Bridges.* If one goes back to the decision of the Court of Queen's Bench in that case, one can see the court accepting there just the sort of argument that has been put forward in this case. In that case there was a purchase by way of an illegal lottery, and subsequently the defendant entered into a covenant with the plaintiff to pay him some money remaining due. This was treated as being a mere voluntary agreement to pay a sum of money after the illegal purposes had come to an end, and so as enforceable. The Court of Exchequer Chamber, however, reversed this decision in a judgment delivered by Jervis CJ. The essence of the decision appears, I think, in this passage:
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> > It is clear that the covenant was given for payment of the purchase money. It springs from, and is a creature of, the illegal agreement; and, as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality.

[22] Learned counsel for the plaintiff argued that the creation of a trust deed by Chin Nyuk Fong in favour of the 4th defendant falls outside the ambit of the Land Ordinance and cannot be considered a "dealing" within the meaning of s. 17(1) of the Land Ordinance. What the argument amounts to is this - the holding in trust of NT213013480 by Chin Nyuk Fong for and on behalf of the 4th defendant is not forbidden by law because it is not a "dealing" within the meaning of s. 17(1) of the Land Ordinance. The short answer to counsel's argument is that a trust deed created with the object of defeating the law is not a valid trust deed.

[23] The decision of the High Court in *Borneo Housing Mortgage Finance v. Bank Bumiputra Malaysia Bhd* [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 HC relied upon by learned counsel must be confined to its own peculiar facts and circumstances. It is clear in that case that a valid Trust Deed had been created to enable the developer to proceed with the development on the native land and to sell the units comprised in the development.

[24] Learned counsel for the plaintiff argued in the alternative that if the term loan facility agreement is found to be void the defendants are bound to refund the monies owing, relying on s. 66 of the Contracts Act which provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[25] In his comments on s. 66 of the Contracts Act the learned author of Law of Contracts in Malaysia and Singapore (Third Ed) has this to say:

> Section 66 is a wide provision which has no direct parallel under English law. English cases are, therefore, not relevant in determining the scope of section 66. If the agreement 'is discovered to be void', section 66 will apply. 'Discovered' has been interpreted to mean that the illegality must not have been known to the party seeking restitution under section 66 at the time the agreement was made. In other words, no remedy will be granted to the guilty party under section 66. In each case, therefore, the courts have to examine the facts of the case to determine whether the party was aware of the illegality at the time the agreement was entered into.

[26] In the present case it is naïve to think that the plaintiff was not aware of the illegality. As an established financial institution whose business it was to give out loans to the public it is inconceivable that the plaintiff would not have at least investigated the legal status of NT213013480 before entering into the term loan agreement with the 4th defendant. After all it was in the plaintiff's interest to make sure that the contract they entered into was not tainted with illegality. Surely the plaintiff cannot be heard to say that it was none of their business to find out if the purchase of NT213013480 (which they must have known to be native title) by the 4th defendant (whom they knew to be a non-

native) did not breach any law. The manner in which the whole transaction was carried out must have aroused their suspicion. In my view the plaintiff knew or at the very least suspected that the purchase of NT213013480 by the 4th defendant was in breach of the Land Ordinance. They must bear the consequences of their imprudence.

[27] For reasons stated above the plaintiff's claim against the defendants was dismissed with costs, to be taxed unless agreed.